UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

DUANE READE, INC.
Employer
and **Case No. 2-RC-22903**

UNITE HERE, NEW YORK JOINT BOARD, LOCAL 340-A, AFL-CIO
Petitioner
and

ALLIED TRADES COUNCIL, DIVISION OF LOCAL 338, RWDSU/UFCW, AFL-CIO
Intervenor

Terry Cooper, Esq., **New York, New York for the Regional Director.**
Tedd J. Kochman, Esq., **of Grotta, Glassman, Hoffman, P.C. Roseland, New Jersey for the Employer.**
Judiann Chartier, Esq., **New York, New York for the Petitioner.**
Amie Ravitz, Esq., **of Friedman & Wolf, New York, New York for the Intervenor.**

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge. The hearing was held before me in New York, New York on January 28, February 4 and February 7, 2005.

At the close of the hearing the parties presented oral argument, which has been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings and Conclusions

1. Procedural History

Pursuant to a Stipulated Election Agreement approved by the Director on October 5, 2004,[1] an election was conducted on October 28 among employees of Duane Reade Inc., herein called Duane Reade or the Employer. The elections consisted of two units in each store. Unit A consists of pharmacists and Unit B, all non professional employees, which included cashiers, stock people, drug clerks, technicians and other categories. The elections were conducted with two unions as choices, UNITE Here, New York Joint Board, Local 340 A, AFL-CIO herein called UNITE or Petitioner and Allied Trades Council Division of Local 338, RWDSU-

[1] All dates hereafter are in 2004.

UFCW, AFL-CIO, herein called ATC or Intervenor.

In Unit A, all five of the elections, resulted in a majority of votes not being cast for inclusion, and a majority of ballots not cast for Petitioner or Intervenor.[2] In Unit B, the results were as follows:

1. Store # 240 - 12 eligible voters, 8 votes for Petitioner, and 1 for Intervenor and no challenges;

2. Store # 241 - 25 eligible voters, 10 votes for petitioner, none for Intervenor, and 3 challenges;

3. Store # 242 - 22 eligible voters, 8 votes for petitioner, 1 for Intervenor and 1 challenge;

4. Store # 261 - 11 eligible voters, 6 votes for Petitioner, 1 for Intervenor and no challenges.

5. Store # 264 - 16 eligible voters, 8 for petitioner, 1 for Intervenor and 2 challenges.

Thereafter, the Intervenor filed timely Objections to the election involving all five stores. The Region conducted an administrative investigation, and issued a Report on Objections and Notice of Hearing, dated January 7, 2005.

The Report recommended that several of the Intervenor's objections be dismissed, [3] and appropriate certifications be issued to the Petitioner for Unit B in stores # 261 and # 264.

With respect to stores # 240, # 241 and # 242, the Report found that substantial issues warranting a hearing were required for Intervenor's Objection # 3 against the Employer's conduct, and Objection No.'s 1 and 2 against the conduct of Petitioner. Therefore, a hearing was ordered to be held before an Administrative Law Judge to receive testimony with respect to those issues.

During the course of the instant hearing, Intervenor withdrew its Objections, to the extent that it had related to Unit A. I granted the request to withdraw and remanded to the Director to issue the appropriate certifications. Thus, the issues before me related solely to the conduct of the Employer and Petitioner concerning the employees in Unit B, in stores # 240, # 241 and # 242.

2. The Objections

Objection 1

This Objection alleges that at Store # 240, Petitioner permitted an organizer to remain on the sidewalk immediately outside the store, in direct contravention of the Board Agent's instructions during a pre-election conference.

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[2] Since the pharmacists are professional employees, they voted on two separate issues as related above.

[3] Some objections filed by Intervenor were also withdrawn.

In support of this Objection, Intervenor called Jay Diaz, an ATC organizer who was ATC's representative at this store, which was located in New Hyde Park, L. I. The hours for voting at this location was 2:00 p.m. to 7:00 p.m.

The election was conducted in a storeroom, inside the store, downstairs adjacent to the pharmacy. There was a separate door to the storeroom where the election was being held.

According to Diaz, at the pre-election conference, before the poll opened, the UNITE representative asked where the representatives of the Unions can wait while the election was taking place. Diaz contends that the Board Agent replied at first that they should be 50 yards or 50 feet from the voting place and the store itself is off limits. Diaz further claims that the Board Agent then added that he didn't want anybody waiting by the front door, and "let's make the sidewalk off limits and the perimeter surrounding the store and the sidewalk is off limits." Diaz further stated that no one objected to this direction by the Board Agent.

Diaz further testified that at about 2:20 p.m., he noticed that Raphael the UNITE representative, got out of his car and was walking on the sidewalk in front of the store back and forth by the front entrance. Raphael according to Diaz, was talking on his cell phone, while walking back and forth. About five minutes later, Diaz testified that an employee who Diaz recognized, but whose name he did not recall, came out of the front door. The employee and Raphael spoke for about a half a minute. Raphael allegedly showed the employee a piece of paper, but Diaz could not see what was on the paper. The employee then mentioned to Raphael to follow him to the employee's car, where the employee was apparently going before meeting Raphael. At that point, the employee and Raphael stepped off the sidewalk and had a brief conversation standing in the parking lot, next to the employee's car.

Diaz testified further that he took two pictures on the day of the election, purportedly supporting his testimony. One picture shows an individual, identified by Diaz as Raphael, walking near the store talking on a cell phone. The second picture shows this same individual talking with another person, identified by Diaz as a "stock boy," employed at the store, talking in the parking lot, next to a car.

Diaz also testified that he observed Raphael two more times while the polls were open. One time, Raphael again made a cell phone call and walked past the Duane Reade store to a Starbucks to get a cup of coffee. He then returned to his car.

About twenty minutes before the polls closed, Diaz states that the UNITE Observer came out of the store, and approached Raphael. Raphael allegedly got out of his car, and had a five minute conversation with the Observer while on the sidewalk. The Observer then went back inside the store, and Raphael went back inside his car.

Raphael Miranda, the Business Agent for UNITE assigned to Store # 240 testified on behalf of UNITE. Miranda asserted that at the pre-election conference the Board Agent gave instructions about the room itself where the voting took place and the perimeter. He could not recall the exact words of the Board Agent, but was certain that there was no mention of the sidewalk or organizers being outside the store. Miranda also testified that during the election from 2 – 7 he remained in his car the entire time, except when he went to get coffee.

Terrace Legare, who has been employed by the Board as an Election Assistant for three and a half years, was assigned to Store # 240 to run the election, testified as well. Legare testified that at the pre-election conference he told the individuals present that he will not be able to police beyond the door to the storeroom where the election was conducted. He

informed the representatives to stand clear of the election area. Legare did not recall giving any instructions to parties to stay off the sidewalk in front of the store. He did not recall any discussion of the sidewalk during the conference.

At the close of the polls, Diaz returned to the store for the count. He admits that he did not complain to the Board Agent about the fact that the UNITE representative had allegedly violated the Board Agent's instructions about the sidewalk, and he signed the certification at the tally of the ballots.

Intervenor argues that ATC's witness Diaz should be credited, over the testimony of Legare and Miranda, because his testimony was clear and uncertain that the Board Agent had stated that the sidewalk was "off limits" during the election, and that Miranda violated that instruction. Therefore, Intervenor contends objectionable conduct has been established. *Milchem, Inc.,* 170 NLRB 362, 363 (1968). I cannot agree.

In *Milchem,* the Board stated that it will set aside elections based on prolonged conversations between representatives of any party to the election and voters in the polling area, waiting to cast their ballots, without inquiry into the substance of the conversation. *Milchem* cautioned however that not every chance or isolated comment by a party to a voter in these areas will necessarily void the election. *Id.* at 363.

The Board further clarified the *Milchem* standards and the issues of electioneering "at or near the polls," in *Boston Insulated Wire & Cable,* 259 NLRB 1118 (1982). The Board observed that while *Milchem* prohibits electioneering "at or near the polls", it does not apply the rule regardless of the circumstances. Thus, the Board concludes that when it is faced with evidence of impermissible electioneering, it must determine whether the conduct is sufficient to warrant an inference that it interfered with the free choice of voting. The factors considered by the Board in making this assessment are; (1) whether the conduct occurred within or near the polling place; (2) the extent and nature of the alleged electioneering; (3) whether it is conducted by a party to the election; (4) whether the electioneering is conducted within a designated no electioneering area or contrary to the instructions of the Board Agent.

In applying the principles of these cases, as well as other precedent cited below, I conclude that even if I were to credit Diaz's testimony[4] in its entirety, Intervenor has not established that objectionable conduct has occurred.

Here, even assuming that Diaz is credited, it proves only that the Board Agent designated the no electioneering area to include the sidewalk, and that Miranda "violated" that instruction three times, during the 5 hour election. However, I note that *Milchem* applies only to "prolonged" conversations between agents of a party to the election and employees waiting in line to vote. *Crestwood Hospitals,* 314 NLRB 1057 (1995). Here not only were there no conversations between Diaz and employees waiting in line to vote, there is no evidence that the two conversations that Diaz had with employees on the sidewalk, were with employees who had

[4] In this regard, while I find it unnecessary to resolve the credibility issues between Diaz and the Board Agent and Miranda, if it's essential that I do so, I credit the Board Agent and Miranda that the Board Agent did not designate the sidewalk as "off limits." I find it highly unlikely that an experienced Board Agent, employed as an election assistant, would designate an area, such as a sidewalk outside the store, where he could not police, as part of the polling area. I note that such an action is prohibited by Section 11326.4 of the Case Handling Manual, which states that a Board Agent should not set up a no electioneering area, which cannot be policed.

not voted. Since it is Intervenor's burden to prove the existence of objectionable conduct, it was Intervenor's burden to prove that the two employees with whom Diaz spoke, had not voted. It failed to do so, and that failure is fatal to any possible claim that Diaz's conduct interfered with the free choice of voters. *N.L.R.B. v WMFT,* 997 F.2d 269, 275-276 (7th Cir. 1993), (Company failed to establish that any eligible voters who had not voted overheard allegedly objectionable statements by union representatives); see also, *Alson Mfg. Co.,* 230 NLRB 735, 741 (1977).

Moreover, *Milchem* prohibits only "prolonged" conversation with employees. Here Diaz's testimony has not established that aspect of *Milchem*. He testified that the first conversation was a half a minute long, and the second with the UNITE's observer was about 5 minutes in length. Neither of these incidents are "prolonged" conversations under *Milchem*. *Bonanza Aluminum Corp.,* 300 NLRB 584 (1990) (conversation described as between two and five minutes, not prolonged under *Milchem); N.L.R.B. v Bostik Division USM Corp.,* 517 F 2d. 471, 476 (1975). (Three separate conversations with employees two or three minutes in length, not objectionable.)[5]

Finally, I also note that the results of the election at this poll, was 8 - 1 in favor of Petitioner with no challenges. Therefore, even assuming that *Milchem* applies, and it is concluded that Diaz engaged in electioneering during his conversations, that the conversations were "prolonged", and they were with voters who had not voted, in view of the large margin of victory by UNITE, it cannot be concluded that Diaz's conduct impaired the employee free choice or affected the results of the election. *Sir Francis Drake Hotel,* 330 NLRB 638 (2000); *Pacific Grain Products,* 309 NLRB 690, 691(1992); D*ayton Hudson v N.L.R.B.,* 987 F. 2d 359, 364 (6th Cir. 1992); *The Mead Corp.,* 189 NLRB 190 (1971).

Accordingly, based on the foregoing analysis and precedent, I recommend that Objection No. 1 based on Petitioner's conduct be dismissed.

Objection 2

The Intervenor alleges in this objection that UNITE at store # 241, permitted its observer to leave the voting area three times, engage in extended conversations on a mobile phone, hand the phone to employees and walk back into the store with other employees.

In support of this objection, Intervenor called Rosa Martinez and Patricia Thompson its organizers, who were present at Store # 241, located at 1076 2nd Avenue, New York, NY. The election at this store was held in two sessions, from 7:00 a.m. to 8:00 a.m., and from 2:00 p.m. to 7:00 p.m.

At this location, the election was conducted in the basement of the store. To get to the basement, it was necessary to go into the store, make a right turn, go down stairs, and go through another door, to get to the place of the election.

Both Martinez and Thompson testified that during the afternoon session, UNITE's observer, Carmella De Costa came out of the store on three separate occasions, to smoke a cigarette. During each of these times, both Thompson and Martinez assert that De Costa spoke

[5] I emphasize that even if the 5 minute conversation with UNITE's observer is held to be "prolonged", there was not only no proof that the observer had not voted, but since the conversation took place twenty minutes before the poll closed, I find it highly likely that he had already voted by the time he had the discussion with Diaz.

to some employees, who they contend were eligible voters, spoke to someone on a cell phone, and handed the phone to the employees. Neither Thompson nor Martinez could hear what De Costa said to the employees, nor could they be certain whether or not these employees had voted prior to speaking with De Costa.

Martinez was unable to furnish the names of the employees, spoken to by De Costa. Martinez estimated that the first conversation lasted 15 minutes, and was with one employee, the second and third lasted five minutes each and was with two or three employees.

Thompson took notes on the day of the election. The notes which were introduced into the record, corroborate her testimony, which provided more detailed information as to the times of the conversations and the employees involved. Thus this evidence tends to show that the first conversation started at 4:10 p.m., and that De Costa spoke with employee Virgie Martin, who was UNITE's observer at the morning session. De Costa used her cell phone, and gave the phone to Martin, who in turn spoke to someone on the phone for several minutes. Martin then went inside the store, stayed a few minutes, and came out and left. At 4:36 p.m. De Costa went back inside the store.

The second break, according to Thompson's notes and testimony occurred at 5:15 p.m. De Costa came outside, smoked a cigarette, and spoke on her cell phone. At that time three employees, came up to De Costa and spoke to her. The employees were Maria,[6] a cashier, a stock boy, and two other employees. De Costa spoke to the employees, gave the phone to two of the employees who spoke to someone, and they went back inside the store together.

The final incident began at 6:28 p.m. De Costa came out of the store, and made a cell phone call. An employee names Yessima came out of the store, and both Yessima and De Costa had a conversation with two other individuals, who Thompson asserts were employees, who were also outside the store. De Costa allegedly handed the phone to the employees, and De Costa then resumed talking to the employees present. The employees then went inside the store. According to Thompson's notes the two unnamed employees left the store at 6:36 p.m.

De Costa did not testify, but UNITE called Katie Connor one of its organizers, who testified that she had made several unsuccessful attempts to reach de Costa, including sending a subpoena, but that De Costa did not respond to any of the petitioner's communications.[7]

UNITE also called several other witnesses with respect to this objection. These witnesses included Julie Kelly, UNITE's Assistant National Organizing Director. She testified that in that capacity, part of her responsibility is training for observers, and that De Costa participated in observer training conducted by Kelly. During the training observers are told that they should follow the instructions of the Board Agent, and that breaks are allowed, but that permission must be secured from the Board Agent before an observer takes breaks during the election. The observers are also given a copy of a document, entitled Instructions to Election Observers, prepared by the NLRB. This document states *inter alia,* that the observer should not "leave the polling place without the agent's consent," and should not "electioneer any place during the hours of the election." Kelly also testified that at the vote count, Intervenor's representative made no complaint about De Costa's conduct, and signed the certification of conduct.

[6] Maria, who Thompson identified as a cashier, and an eligible voter, was not on the Excelsior list. Thompson did not know why Maria's name was not included.

[7] De Costa is no longer employed by Duane Reade.

Virgie Martin also testified on behalf of Petitioner. She was UNITE's observer at the 7:00 a.m. to 8:00 a.m. session. Martin voted during the morning session while she served as an observer. Martin worked at the store the rest of the day. She testified that she remained in the store all day, except for her lunch break, between 2:00 p.m. and 3:00 p.m. Martin left the store at the close of her shift at 4:00 p.m.

Martin testified that she did not recall if she saw De Costa outside the store on the sidewalk, between 2:00 p.m. and 4:00 p.m. She did not testify one way or the other about having a conversation with De Costa outside the store that day, and consequently did not deny having such a discussion.

Menawhie Dallu was an employee of the Employer at Store # 241. She worked from 8:00 a.m. to 5:00 p.m. on the day of the election. Dallu testified that on that day, she saw De Costa only at the election when she voted, and did not see De Costa outside the store that day. However, Dallu admitted that from where she works in cosmetics, she cannot see outside or when employees walk in and out of the store.

Leroy Johnson was employed as a stock person at store # 241. On the day of the election he testified that when he went to vote, he heard De Costa ask the Board Agent for a cigarette break. According to Johnson, the Board Agent said "sure, go ahead." Johnson testified further that he observed De Costa leave the polling area to go on a break, and he did not see her after that, and that he never saw De Costa outside.

Venus Rojas was Duane Reade's observer at poll # 241. According to Rojas, during the course of the afternoon session, De Costa took from 2 - 4 breaks to smoke a cigarette or to go to the rest room. Rojas estimated that the breaks were each about five minutes long. She also testified that she also took breaks, and in each case, the Board Agent gave permission for breaks, as long as at least one observer was present. It is undisputed that Intervenor did not have an observer at this poll.

I credit the mutually corroborative testimony of Martinez and Thompson, which is supported by Thompson's contemporaneous notes. I note that De Costa, was not called as a witness to deny this testimony. Further, the testimony of some of UNITE's witnesses, such as Rojas and Johnson confirm that De Costa did take cigarette breaks, and did not refute the testimony of Thompson and Martinez that during her breaks, outside the store, De Costa spoke to several employees and handed them a cell phone to speak to someone.

The issue then is presented as to whether the conduct of De Costa warrants setting aside the election. Intervenor argues that observers are held to a higher standard than other participants in the election, and that observers are not allowed to electioneer during the election. *Monroe Auto Equipment Co.,* 186 NLRB, 90, 119 (1970); Section 11326.2 of the Board's Instructions and Guidelines.

Intervenor argues further, that while none of its witnesses could testify as to the substance of the conversations, between De Costa and the employees, it is reasonable from the circumstances, particularly the evidence that De Costa handed them a cell phone and the employees spoke with someone over the phone, to assume that De Costa was engaged in electioneering. I cannot agree.

While it is permissible and in fact is required to assume that conversations between representatives of parties during the election, that take place in the polling area, constitute electioneering, *Milchem, supra,* no such presumption is possible, where as here the discussions

were not in the designated polling area.[8]

Since *Milchem,* is not applicable, it is necessary to evaluate the facts under the standards of *Boston Insulated Wire,* as set forth above, which regulates alleged "impermissible electioneering, at or near the polls."

In making this analysis, I again emphasize that Intervenor has not established that any "electioneering" took place during these conversations between De Costa and the employees. While it is true as Intervenor argues that the circumstances here, including the fact that De Costa handed a cell phone to some employees and these employees spoke to someone on the phone, can lead one to surmise that De Costa was campaigning and that the person on the other end of the cell phone was an official of UNITE. However, the burden of proof of establishing objectionable conduct is on the objecting party, and it cannot be met by surmise or speculation. Evidence is required, and the absence of any direct evidence of what the conversations were between De Costa and the employees, or between the employees and the person on the other end of the cell phone is fatal to Intervenor's claim, that electioneering was involved in these conversations. *Cedars-Sinai Medical Center,* 342 NLRB #58 (2004) (No evidence that observers conversations to employees on breaks related to election); see also, *Sawyer Lumber Co.,* 326 NLRB 1331, 1332-33 (1998).

Moreover, even if I were to assume that electioneering did take place during these conversations, I would still not conclude that objectionable conduct has been established. Thus, another damaging flaw in Intervenor's position is its failure to establish that any of the employees involved in the conversations with De Costa had not yet voted. *NLRB v. WMFT, supra; NLRB v. Dickinson Press,* 158 LRRM 3096, 3100 (6th Cir. 1998).

Indeed to the contrary, the evidence established that employee Virgie Martin, with whom De Costa had the longest conversation of the three, (15 minutes), was UNITE's observer in the morning session, and voted during that time. Thus, she had already voted when she had her discussion with De Costa. Therefore, whatever was said between De Costa and Martin could not have affected the election results. Furthermore, one of the other employees with whom De Costa spoke, Maria was not on the Excelsior list, which suggests that she was not an eligible voter.

Finally, I conclude that evaluating the *Boston Insulated Wire* factors, objectionable conduct would still not be found, even if it was concluded that the employees had not voted and that electioneering had taken place during the conversations between De Costa and employees. Thus as in *Boston Insulated Wire,* itself, the electioneering was conducted away from the polling place, was not directed at employees waiting in line to vote, and the electioneering did not violate any instructions of the Board Agent.[9]

In such circumstances, the conduct is not sufficient to warrant the inference that it interfered with the free choice of the voters. Id. at 1119, *De Rey Tortilleria, supra.*, 272 NLRB at 1107, 823 F. 2d at 1140.

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[8] I note that there is no evidence or contention that the Board Agent at this poll designated the sidewalk as part of the polling area.

[9] Intervenor adduced no evidence that the Board Agent instructed De Costa not to talk to employees during her break or even not to campaign. The Board Agent simply allowed De Costa to take a break, as long as there was at least one observer present.

Intervenor's citation of *Monroe Auto Equipment, supra.,* is unconvincing. While in that case, the Administrative Law Judge did state that observers may not electioneer during the election whether at or away from the polling place, citing the Board's Instructions and Guidelines Section 11363.2, he did not state, nor did the Board find that any instances of electioneering by observers is automatically objectionable. Indeed, in *Monroe Auto Equipment*, the Administrative Law Judge did not find the evidence of conduct alleged to be electioneering was objectionable, (observer saying "Howdy" to employees, and assisting Board Agent in releasing employees to vote) and dismissed that particular objection. Therefore, *Monroe Auto Equipment, supra.,* does not support Intervenor's contention that De Costa's conduct was objectionable.

Accordingly, based upon the foregoing analysis and precedent, I recommend that Objection 2 be dismissed.

Objection No. 3

This objection involves allegedly unlawful conduct by the Employer at Store # 242, by "permitting employees to engage in extended discussions with a UNITE organizer during work hours and immediately outside the store, while ordering an employee back to work when approached by an ATC/Local 338 organizer."[10]

Intervenor called its representative Reynaldo Rosado with respect to this objection. This store was located at 401 West 86th Street, New York, N.Y. and the election was conduced from 7:00 am to 8:00 am, and from 2:00 pm to 7:00 pm at this store.

Rosado testified that shortly after the polls opened for the afternoon session, he observed UNITE's organizer, named Pavel speaking with an employee named "Mia."[11] According to Rosado, Gerardo Pavel spoke with Gilmore for about fifteen minutes as she was smoking a cigarette. Rosado further asserts that he and another representative from ATC went over and spoke to Gilmore at the same spot for about four minutes. At that point, Gilmore's supervisor and assistant manager "Lydia" came over to Gilmore and instructed her to come in and go back to work. Rosado did not know where Lydia was while Pavel[12] was speaking to Gilmore, and could not testify that Lydia was aware that Pavel had spoken to Gilmore, before Rosado was able to speak to her. Rosado also made notes of this incident, which were introduced and confirmed his account. Further, Rosado produced two pictures, that he testified that he took on the day of the election. These pictures purportedly show Pavel talking to Gilmore.

Pavel Gerardo testified on behalf of UNITE. Gerardo testified that he did not recall speaking with Gilmore on the day of the election. He conceded that the pictures in evidence, depicted Gilmore and him talking. However, Gerardo insisted that the pictures were taken several weeks prior to the election, and that they were taken, not by Rosado, but by another representative from ATC, "Patricia Thomas."

Patricia Thomason (who presumably is the Patricia Thomas referred to by Gerardo)

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[10] Intervenor in its objections alleged that Petitioner had engaged in objectionable conduct by engaging in discussions with an employee in full view of employees inside at store # 242. This objection was withdrawn with respect to Petitioner's conduct at this store.

[11] The record reflects that the employee involved is named Rasmiyah Gilmore, who is known as "Miyyah."

[12] Pavel's full name is Pavel Gerardo.

testified on rebuttal that she never even went to store # 242 during the campaign, and denied that she ever took any pictures of any employees at any stores. Rosado also testified on rebuttal that he himself took the pictures on the day of the election, but that they were not developed until shortly before the hearing.

Lydia Cividanes, the Employer's assistant manager at store # 242, testified that she did recall seeing Gilmore outside the store on the day of the election, but states that if she overstayed her break "I might have told her to come back inside the store." Cividanes testified that she did not recall seeing Gilmore speaking with an organizer for ATC or for UNITE outside the store that day.

Cividanes further testified that employees generally are entitled to 5 or 10 minutes for a cigarette break, and states that Gilmore frequently takes cigarette breaks, and she frequently finds it necessary to tell Gilmore to come back to work, but she does not recall if it happened on the day of the election.

I credit the testimony of Rosado as detailed above, since it is corroborated by his contemporaneous notes and the pictures that he submitted. Further Cividanes, although she did not recall seeing Gilmore outside on the day of the election, or telling her to come inside at that time, was uncertain whether it had occurred on that day. She conceded that she had in the past frequently told Gilmore to come back to work when she extended her break and I find that is what happened on the day of the election.

Rosado could not testify as to whether Cividanes saw Gilmore talking to Gerardo or whether or not Cividanes even knew that Gerardo was a representative of UNITE or that Rosado was a representative of ATC. Therefore Intervenor has not established any discriminatory treatment by Duane Reade *vis-à-vis* the conversations between Gilmore and the union representatives. In these circumstances no objectionable conduct has been established. Further, since at most only one employee, Gilmore, could have been affected by the conduct alleged, it could not have affected the results of the election. *Alson Mfg., supra.; Mead Corp., supra; Sir Francis Drake Hotel, supra.*

Therefore, I recommend that Objection 3 be dismissed.

Conclusion and Recommendation

Based on the above findings, and the entire record, I recommend that all of the objections before me be dismissed, and that Case No. 2-RC-22903 be remanded to the Regional Director for Region 2 for the purpose of issuing the appropriate certifications.[13]

Dated:
Washington, D.C.

Steven Fish
Administrative Law Judge

[13] Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washing, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 2. If no exceptions are filed, the Board will adopt the recommendations set forth herein.